

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI R. GLENN	)	
	)	Civil Action
v.	)	
	)	
LARRY G. MASSANARI, Acting	)	No. 00-4184
Commissioner of Social Security	)	

**MEMORANDUM**

**Padova, J.**

**August , 2001**

The instant matter arises on cross motions for summary judgment regarding the denial of disability benefits to Plaintiff Terri Glenn. The case was referred to the Magistrate Judge, who filed a Report and Recommendation on July 16, 2001, and recommended granting Plaintiff's motion and remanding the case to the Commissioner for further proceedings. Defendant filed timely objections to the Magistrate's Report and Recommendation. For the reasons that follow, the Court sustains Defendant's objection to the Magistrate's interpretation of the applicability of criterion 9.09 governing obesity, but overrules the objection to remanding the case. The Court remands this case to the Commissioner for further proceedings consistent with this Memorandum.

**II. Legal Standard**

Under the Social Security Act, a claimant is disabled if she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which

can be expected to ... last for a continuous period of not less than twelve (12) months." 42 U.S.C.A. §423(d)(1)(A); 20 C.F.R. §404.1505 (1981). Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential evaluation to evaluate disability claims.<sup>1</sup> The burden

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<sup>1</sup>The five steps are:

1. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

2. You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

3. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

4. Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

5. Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule.

20 C.F.R. §§ 404.1520(b)-(f).

to prove the existence of a disability rests initially upon the claimant. 42 U.S.C. §423(d)(5) (1994). To satisfy this burden, the claimant must show an inability to return to his former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971); Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to

all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir. 1983).

### **III. Discussion**

Plaintiff applied for, but was denied disability benefits under the Social Security Act. Plaintiff claimed she had been disabled since July 25, 1995, primarily due to obesity, but also resulting from asthma, arthritis, and degenerative joint disease of the left knee. A hearing was held before an administrative law judge ("ALJ"), who subsequently denied the claim. In this action, Plaintiff claims that the Commissioner made improper determinations under steps 3, 4, and 5. With respect to step 3, Plaintiff contends the Commissioner erred in concluding that Plaintiff did not meet the obesity listing.

The Magistrate Judge recommended granting Plaintiff's motion and remanding the case to the Commissioner for clarification as to whether Plaintiff is disabled under the former listing 9.09 governing obesity. Listing 9.09 was in effect at the time of the Commission's initial determination and the ALJ hearing, but was subsequently repealed effective October 25, 1999. Revised Medical Criteria for Determination of Disability, Endocrine System and Related Criteria, 64 Fed. Reg. 46122 (Aug. 24, 1999). In a subsequent administrative ruling issued on May 15, 2000, the Commissioner clarified that the rule was intended to apply retroactively. Soc. Sec. Ruling 00-3p (C.E. 2000) ("The final

rules deleting listing 9.09 apply to claims that were filed before October 25, 1999, and that were awaiting an initial determination or that were pending appeal at any level of the administrative review process or that had been appealed to court. The change affected the entire claim, including the period before October 25, 1999.") The Commissioner further noted that, "different rules apply to individuals who were already found eligible to receive benefits prior to October 25, 1999."<sup>2</sup> Id.

The Magistrate Judge concluded that the new final rule should not apply in this case, because "[a]s a practical matter, . . . a claimant who was found disabled on the basis of obesity prior to the repeal of Listing 9.09 would continue to be entitled to benefits, whereas a claimant who was denied benefits as a result of a misapplication of Listing 9.09 would be precluded from receiving benefits, even if the misapplication pre-dated the repeal of Listing 9.09. We find that such a result would be inequitable and,

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<sup>2</sup>In the original final rule, the Commission stated that, "No individual will be removed from the rolls solely because we have deleted listing 9.09, as some commenters suggested. We will not review prior allowances based on listing 9.09 under the new rules. . . . Unless otherwise required to do so (for example, by statute), we do not readjudicate previously decided cases when we revise out listings." 64 Fed. Reg. at 46127. This language led some courts to conclude that the revised rule was not intended to be applied retroactively. See Nash v. Apfel, No.99-7109, 2000 U.S. App. LEXIS 12030, at \*6 (10th Cir. June 1, 2000); Rudolph v. Apfel, Case No.00-4093-DES, 2000 U.S. Dist. LEXIS 19191, at \*19-20 (D. Kan. Dec. 29, 2000). However, neither of these courts considered the effect of the Commissioner's May 15, 2000 ruling.

therefore, we conclude that Listing 9.09 should apply to this case." Mag. Rep't. & Rec. at 15 (emphasis in original).

The Defendant objects and contends that the revised listings must be applied retroactively, and that the Magistrate Judge therefore erred as a matter of law. The Court sustains this objection. In considering the appeal, the Court must consider Listing 9.09 as having been deleted, even if it had still been part of the regulations at the time the ALJ made his decision. See Havens v. Massanari, Civ.Act.No.99-1008-MLB, 2001 U.S. Dist. LEXIS 9009, at \*3-4 (D. Kan. May 9, 2001); Fulbright v. Apfel, 114 F. Supp. 2d 465, 476 (W.D.N.C. 2000); Wooten v. Apfel, 108 F. Supp. 2d 921, 924 (E.D. Tenn. 2000). The language of the Commissioner's May 2000 ruling is clear that the revised listings apply retroactively to cases which have been appealed to court. The rule explicitly acknowledges that a different rule applies to cases in which benefits have already been awarded under 9.09. In this case, the Plaintiff was not previously awarded benefits under 9.09. Because 9.09 was deleted, the ALJ cannot have been in error for denying the claim on the basis that 9.09 was not met. See Fulbright v. Apfel, 114 F. Supp. 2d 465, 476 (W.D.N.C. 2000) ("The removal of former Listing 9.09 and subsequent revision . . . is the law in effect for this case. . . . Therefore, the ALJ did not err in failing to find the Plaintiff's height and weight alone as a basis for disability."); Havens v. Massanari, Civ.Act.No.99-1008-MLB, 2001

U.S. Dist. LEXIS 9009, at \*5 (D. Kan. May 9, 2001) (remanding case so that the Commission could "evaluate plaintiff consistent with the new rules. . .")

Notwithstanding the elimination of the separate obesity listing, however, the Court concludes that remand to the Commission is still appropriate in this case. The elimination of the separate obesity listing does not mean that obesity should not be considered with respect to the step 3 disability inquiry. The revised regulations added the following language to the listings 1.00 (musculoskeletal system), 3.00 (respiratory system), and 4.00 (cardiovascular system):

Obesity is a medically determinable impairment that is often associated with disturbance of the musculoskeletal system, and disturbance of this system can be a major cause of disability in individuals with obesity. The combined effects of obesity with musculoskeletal impairments can be greater than the effects of each of the impairments considered separately. Therefore, when determining whether an individual with obesity has a listing-level impairment or combination of impairments, and when assessing a claim at other steps of the sequential evaluation process, including when assessing an individual's residual functional capacity, adjudicators must consider any additional and cumulative effects of obesity.

64 Fed. Reg. at 46128.

The Magistrate Judge pointed to several ambiguities in the ALJ's denial of Plaintiff's disability classification that, even in the absence of a separate obesity listing, call into question the validity of the disability determination under the revised

regulations. In this case, the ALJ determined that the Plaintiff did not meet the requirements of the obesity listing because Plaintiff lacked objective evidence of an arthritic condition in the knees or spine. Specifically, the ALJ concluded:

While the undersigned notes that at certain times the claimant's weight did meet the criteria of this Section, the undersigned does not find documentation of the requisite attendant finding necessary to establish that claimant meets this Section of the listings. Further, the undersigned specifically posed that question to the medical expert and he testified that none of the claimant's impairments either considered singly or in combination meet or equal the listing level of severity. Accordingly, while the undersigned has found that the claimant has severe impairments by combination, she further finds that the claimant's impairments do not meet or equal any of the listed impairments in Appendix 1.

(Tr. 18).

The Magistrate Judge concluded that important aspects of the ALJ's discussion were ambiguous. With respect to Plaintiff's obesity, the ALJ appeared to suggest that at times Plaintiff did not satisfy the weight requirement to be considered obese, even though the evidence clearly supported that Plaintiff met the weight requirements at all times. Rep't & Rec. at 17. The Magistrate also concluded that the ALJ was ambiguous with respect to her discussion of Plaintiff's history of pain and limitation on weight-bearing joints, particularly with respect to the degenerative joint disease and arthritis. Rep't & Rec. at 18.



Considering and agreeing with these ambiguities as articulated by the Magistrate Judge, the Court concludes that they also have a bearing on Plaintiff's potential to be classified as disabled under the revised rules. In particular, it is unclear that the Commission considered the evidence of Plaintiff's obesity and the medical evidence of her other conditions, particularly with respect to whether she had an arthritic or degenerative joint disease condition. A finding by the ALJ that Plaintiff had multiple arthritic conditions, combined with a consideration of possible additional or cumulative effects of Plaintiff's obesity could change the result in this case under Step 3. Accordingly, the Court grants Plaintiff's Motion for Summary Judgment, denies Defendant's Motion for Summary Judgment, and remands the case to the Commissioner to clarify whether Plaintiff is disabled (Step 3) under the new guidelines.

An appropriate Order follows.

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**ORDER**

**AND NOW**, this                      day of August, 2001, upon careful consideration of the Magistrate Judge's Report and Recommendation and Defendant's objections thereto, and upon independent review of the Cross Motions for Summary Judgment filed by the parties, **IT IS HEREBY ORDERED** that:

1. Defendant's objection is **SUSTAINED** in part and **OVERRULED** in part. Defendant's objection to the application of Listing 9.09 (obesity) is **SUSTAINED** and its objection to the recommendation to remand is **OVERRULED**. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent it is consistent with the accompanying memorandum.

2. Plaintiff's Motion for Summary Judgment (Doc. No. 10) is **GRANTED** consistent with this memorandum.

3. Defendant's Motion for Summary Judgment (Doc. No. 13) is **DENIED**.

4. The decision of the Commissioner which denied supplemental security income benefits and disability insurance

benefits to Plaintiff is **REVERSED** and the case is **REMANDED** to the Commissioner for further proceedings in accordance herewith.

BY THE COURT:

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John R. Padova, J.